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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

NO. 891

RUTH E. LAYTON, FARMERS UNION, and LAYTON SUGAR COMPANY, a corporation,

(APPELLANTS BELOW) PETITIONERS,

vs.

WILLIAM J. THAYNE, DAVIS COUNTY BANK, WALTER WRIGHT, MORRISON-MERRILL AND COMPANY, PRESTON PARKINSON and COT HEADLUND, Doing Business as RUDY AND HEADLUND, and CLIFTON B. LAYTON, Debtor,

(APPELLEES BELOW) *Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT AND BRIEF.

This statement supplements petitioners' statement.

On this petition, there is cited authority, for the proposition, that this Court has the "power and authority" to grant certiorari, and has done so in some cases to review decisions of Circuit Courts of Appeal involving the bankruptcy statutes. This may be conceded. No authority is cited in support of the contention that certiorari should be here granted.

The petitioner does suggest (p. 8) as a too general reason for granting the petition that:

> "The judgment of the Circuit Court of Appeals is contrary to the letter and spirit of the statute as interpreted in:
>
> *John Hancock Mutual Life Insurance Co. v. Bartels,* 308 U. S. 180, 84 L. Ed. 176;
>
> *Wright v. Mountain Trust Bank,* 300 U. S. 440, 81 L. Ed. 736."

There is manifestly no similarity between those cases or the matters discussed and the case before the court. In the first case the court held that the debtor had a right upon failure to effect a settlement under Section 75 to be adjudged a bankrupt in the manner provided by subsection (s) of Section 75 without a showing of good faith in the attempted settlement.

The other case simply held, for the first time, that the new subdivision (s) enacted August 28, 1935 was constitutional, as against the claim of a secured creditor, that he was deprived of his property without due process of law. Neither of these cases involves any question of the rights of general creditors where the debtor petitions for bankruptcy under the old subsection (s).

In matters of review of decisions of Circuit Courts, rule No. 38 of the Supreme Court rules, Par. 5, recites that:

> "A review on Writ of Certiorari is not a matter of right, but of sound discretion and will be granted only where there are special and important reasons therefor."

Section "B" then states the character of reasons which petitioner must present, and the petition here shows none of these.

One of the reasons is stated to be where a Court of Appeals "has decided an important question of Federal Law which has not been, but should be settled by this Court." This is the only stated reason that could be here involved.

It is the one petitioner apparently attempts to come under by the statement (p. 10) that:

> "So far as known the specific question as to the right of creditors under Section 75 of the Bankruptcy Act has not been before this court."

It is obvious that it is not, and cannot be, before this Court on this petition. It is also obvious that the Circuit Court of Appeals did not decide this "question of Federal Law". The question that the Circuit Court did decide has been settled by this court and that question was determinative of the issue presented to the Circuit Court of Appeals. No question of creditors or notice to creditors is involved in the decision.

The Circuit Court of Appeals in its decision here (116 Fed. (2d) 796) recited that the bankrupt filed on April 19, 1933 a petition for relief under Section 75 Subs. (a) to (r) of the Bankruptcy Act, 11 U. S. C. A., Sec. 203. That on April 23, 1935, to use the language of this court in:

> *Union Joint Stock Land Bank vs. Byerly,*
> 310 U. S. 1, 60 S. Ct. 773, 84 L. Ed. 1041,

the petitioner

> "abandoned proceedings under sections (a) to (r) of Sec. 75 and filed an amended petition to be adjudged a Bankrupt pursuant to Sec. 75 (s)."

That such an amended petition was filed here is recited by the petitioner (R. p. 6) and was followed by a dismissal of such amended petition by the District Court after certain provisions of the Bankruptcy Act were held unconstitutional. The creditor never filed a petition to be reinstated. That this was an abandonment which the bankrupt had a right to make is indicated by the language of Sec. 75 (s) both as originally enacted and as amended, and also by the decisions of this Court in the case just quoted and cited and on this the Circuit Court of Appeals also cited in its opinion,

> *Hardt, vs. Kilpatrick,*
> 91 Fed. (2d) 875 (9 C. C.), and
>
> *Bernards vs. Johnson,*
> 103 Fed. (2d) 567 (9 C. C.).

On this point there appears to be no conflicting Circuit Court of Appeals decisions and the decisions cited are in harmony with the decisions of this Court.

After such dismissal, the bankrupt not only failed to file for reinstatement under the amended Sec. 75 (s), but refused to do so. (See Findings, R. p. 23).

The Circuit Court here held on this, following and citing *Union Joint Stock Land Bank vs. Byerly,* supra, that the bankrupt had not been in bankruptcy since the dismissal of his petition under Sec. 75 (s) May 27, 1935, and therefore the creditors petitions filed in 1940, to have vacated an order of dismissal entered December 10, 1938, were properly denied.

No question of the right of a creditor to obtain a reinstatement of Bankrupt under 75 (s), as amended, is involved or decided. No question of the right of creditors to control the bankrupt in filing an amended petition to abandon Sec. 75 (a) to (r) is here presented. The bankrupt was and is entirely out by his own authorized conduct. This is settled by the decision in Union Joint Stock Bank case, supra.

QUESTION OF NOTICE TO CREDITORS IS A MOOT QUESTION.

This objection could probably stop here. We point out, however, that under the record brought up here, it is further demonstrated that anything that might be decided with relation to these unsecured creditors in this case would be a purely moot proposition. It could avail these creditors nothing. The effort of the creditors here could only be an attempt to procure something out of the forty (40) acres of farm property covered by the Findings and by the Stipulation contained in the record (See R. p. 28, Stip. p. 22). Such delayed proceedings by purported creditors could serve only to keep an alleged bankrupt for years in possession of property to which he and they have no right.

This farm was listed as having a value of $8,300.00. (See R. p. 3). On April 19, 1933, when creditor first filed under Sec. 75, the farm had been foreclosed and a Sheriff's certificate of sale issued to a former mortgagee who had bid in the property under the mortgage for its claim of $13,100.40. The property was never redeemed so that it passed under this sale. The amount of this encumbrance alone was substantially more than the value of the property.

The property, if it had been taken under the Bankruptcy Act, could be taken only subject to all existing liens.

Thompson vs. Fairbanks,
196 U. S. 516, 25 S. Ct. 306, 49 L. Ed. 577.

The Bankrupt had lost this property and the bankruptcy court could not acquire jurisdiction of it, but only of such property rights as the bankrupt had.

Wright vs. Union Central Life Insurance Company, 304 U. S. 502, 82 L. Ed. 1490.

PROPERTY ACQUIRED AFTER PETITION FILED.

The Rural Rehabilitation Director for Utah, then attempted to assist the debtor to purchase again this farm by the use of the certificates of the Building and Loan Association which had foreclosed and acquired the property for the amount of its debt, $13,100.40, and by purchasing its certificates at a reduced price and exchanging them at their face. The Rehabilitation Director advanced $3,600.00 for this purpose, for which he later took a mortgage. The property was purchased in the name of the debtor December 28, 1935, and after the debtor was out of bankruptcy. In order to clear the title the debtor at that time borrowed from the Davis County Bank, $5,000.00 which was used to clear the title on this repurchase, by the payment of delinquent taxes, etc. and liens against the water stock and other judgment liens. (See R. p. 27). The taxes for 1937, 1938 and 1939 were allowed to become delinquent again, so that these new purchase price liens and taxes again exceeded the value of this farm. It is obvious that there was never anything for these unsecured creditors and that they could in no way be here prejudiced. The Court will consider only errors which are prejudicial.

Drybrough vs. Ware, 111 Fed. (2d) 548 at 550.

Even if bankrupt had been in bankruptcy when this property was acquired, it would not be subject to creditors claims in such proceeding because it was acquired after the petition was filed from funds furnished afterward.

Wright vs. Union Central Life Insurance Company, 304 U. S. 502, 82 L. Ed. 1490.

PROPERTY WAS AGAIN LEGALLY FORECLOSED.

Thereafter and while the petitioners claim the debtor was in bankruptcy, the Court authorized the foreclosure of the rural Rehabilitation Director's mortgage which had then been transferred to the name of William J. Thayne, the Rehabilitation Director. (See R. p. 11). This mortgage was foreclosed subject to the Davis County Bank mortgage under this authority. (See R. p. 28). This foreclosure of this property was valid and effective.

Union Joint Stock Bank vs. Byerly, supra;

Borchard vs. California Bank,
107 Fed. (2d) 96 (9 C. C.);

Wright vs. Vinton Branch of Mountain Trust Bank, 300 U. S. 440 at 463, 57 S. Ct. 556 at 562, 81 L. Ed. 736, 112 A. L. R. 1455.

PETITIONING CREDITORS NOT PREJUDICED.

These creditors although admitting notice of the filing under 75, R. p. 15 never filed any claims and did nothing for seven years. They are claiming merely that they did not get notice of an order of dismissal which the Circuit Court of Appeals has held was made at the time the creditor was not in bankruptcy at all. The District Court, however, in considering their petitions and prior to the order of April 1, 1940 denying them, ordered the appearance of all claimants and creditors and everyone having any interest and they were noticed. (R. p. 16-18). This District Court was one exercising equity jurisdiction,

Pepper vs. Litton,
308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281,

and could and did therefore review this matter at a subsequent time upon full notice,

Kenyon v. Chain O'Mines, Inc.,
107 Fed. (2d) 160.

The Court then decided adversely to the creditor all the matters contained in the Findings as reasons for the Court's refusal to reopen the matter including the order of December

10, 1938 and the matter of the creditors laches. So, for this reason, also, petitioners were not prejudiced even if Bankrupt had been still under the Court's jurisdiction.

Leinweber vs. Federal Land Bank of St. Louis,
95 Fed. (2d) 240 (7 C. C.).

This case also states that creditors cannot reinstate a debtor over his objection.

We point out, also, that under Subdivision 4 of General Order No. 50 in bankruptcy, even if the bankrupt had remained under 75, that since the Conciliation Commissioner reported April 19, 1934 to the District Court that "no agreement was reached." (R. p. 6). And again reported February 26, 1937 recommending the dismissal of the proceedings (R. p. 10, 26, Finding 6), that the order of December 10, 1938 could be properly entered without notice. This General Order Provision is entirely independent of the proceedings referred to in the statutes cited by petitioner and reads:

> "If the farmer has not applied for confirmation within such reasonable time as has been finally fixed therefor, which shall be not later than three months after the first meeting, the Conciliation Commission shall, unless the Judge for cause shown, has permitted a further extension, forthwith report the facts to the Judge who shall thereupon dismiss the proceedings."

This brief statement, we believe sufficiently indicates that there is no ground or reason for the granting of a Writ of Certiorari in this case, that the only matter suggested as a reason is not at all involved, and if it were involved and decided, the court would be deciding a purely moot issue.

Respectfully submitted,

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